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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
HERBERT E. MORRIS,
Attorneys,
Department of Justice, Washington 25, D.C.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered in this case on January 20, 1960, the writ to issue, however, only in the event that this Court grants the petition for a writ of certiorari in No. 209, this Term.

OPINION BELOW

The opinion of the Court of Claims (Pet. App.[1] 17–26) is reported at 180 F. Supp. 342.

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[1] "Pet. App." refers to the petition in No. 209, this Term, in which the opinion below is set forth.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. Petitioner's motion for rehearing was denied on April 6, 1960. On July 2, 1960, the time for filing a cross-petition for a writ of certiorari was extended by Mr. Chief Justice Warren to and including September 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims misconstrued the contingent fee clause in a government procurement contract in holding that the employment of two individuals essentially responsible for obtaining a contract with the Government did not violate that clause.

CONTRACT PROVISION INVOLVED

> ARTICLE XVII. *Contingent Fees.* The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or undertaking for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

STATEMENT

This action was brought by the respondent in the Court of Claims seeking damages for an alleged breach of its contract with the United States for the production of tungsten in Portugal and the sale of such tungsten to the United States. After a lengthy trial, the Court of Claims held that the Government had committed a breach of the contract; rejected the Government's contention that the respondent's employment of two individuals who negotiated and executed the contract in its behalf violated a clause of the contract prohibiting the payment of a contingent fee therefor; and awarded damages of $508,200.

In No. 209, this Term, the respondent seeks review of that decision on the ground that it was entitled to greater damages. We are filing a brief in opposition in that case. The present conditional cross-petition raises the issue whether the contingent fee provision of the contract was violated. While this issue may not independently warrant review, we believe that it should be reviewed if the Court grants the petition in No. 209. A respondent can always rely upon additional grounds for supporting the judgment below. However, the Government's argument on the contingent fee provision, if accepted, would not only support the judgment below in the sense that it would preclude any increase in the damages, but would absolve the Government of any liability. For that reason, a conditional cross-petition is appropriate. See *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320, 324–325.

The findings with respect to the negotiation and execution of the contract are summarized in our

brief in opposition in No. 209. We shall summarize here only those findings that deal with the contingent fee question.

1. *The Findings Below.* The negotiation of the petitioner's contract with the United States was accomplished by two Americans, Colonel Lawrence Westbrook and Mr. Heinz Pulvermann. Colonel Westbrook's background included management of cotton and ranching interests, executive and advisory positions with various state and federal relief organizations, and subsequent to military duty in World War II, positions with the American subsidiary of a French engineering and banking concern and as executive director of the staff of the Defense Housing Commission of the Department of Defense (F. 6(a)–(h)). During part of the time spent on negotiations of this contract, he also served as Assistant Chairman of the Democratic National Committee (F. 6(j)). At the time he began his efforts to obtain a contract for the petitioner with the United States, Colonel Westbrook had embarked on freelance endeavors under the name of "Westbrook Associates", a flexible organization consisting of himself and any other person with whom he might collaborate in various business ventures (F. 6(i)).

Mr. Pulvermann was of German background, having held executive positions in various lignite companies in that country prior to fleeing from the Nazi regime (F. 7(a)(c)(d)). After a period in France where he engaged in refugee rehabilitation work, he came to this country, was naturalized in 1950 and engaged in various types of salesmanship, promotion

and international brokerage (F. 7(e)). His only activity with Colonel Westbrook, prior to this contract, was as consultant to German mining organizations on the reconstruction of workers' housing (F. 8(b)).

It was Mr. Pulvermann, who, on a trip to Portugal, first became aware of Dr. Soares' plan to form the petitioner with the purpose of obtaining a long-term contract to permit profitable organization and development of certain Portuguese tungsten sources (F. 34, *et seq.*). He returned to this country, informed Colonel Westbrook of the plan, and the two initiated contacts with American Government officials in an effort to obtain a long-term contract for tungsten with the United States (F. 34, *et seq.*). Colonel Westbrook continued his efforts in this country, attempting to obtain a contract with the United States while Mr. Pulvermann spent a good part of the contract negotiation period in Portugal (F. 34, *et seq.*).

Prior to full engagement in these activities, the two men determined on a basis of compensation for their services to the petitioner (F. 39(b)). They resolved on payment on a commission basis, their contract with the petitioner providing essentially for compensation of five per cent on all sales under the contract up to specified tonnages (F. 39(b), 50(b)). They further decided, on advice of counsel, that their contract should describe them as sales agents (F. 39(b)).[2]

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[2] The contract between the petitioner and Colonel Westbrook and Mr. Pulvermann also described them as "industrial consultants" to the petitioner and as exclusive sales agents for

The Court of Claims found that Colonel Westbrook, drawing on his knowledge of Government procedures and acquaintances with Government officials, elective and appointive, limited his influence to "what is known in Washington as the opening of doors"[3] (F. 137(c)), and "his advocacy was rested on the merits of his case" (F. 137(c)). The court also found that it was accepted practice in both business and Government during this period for businesses to attempt to secure Government contracts through the use of contingent fee arrangements with bona fide employees or bona fide established commercial or selling agencies maintained by the contractor (F. 135). Further, the court found that the arrangement for compensation on a percentage-of-sales basis was made in good faith by the petitioner and the two Americans to create incentives for all concerned, and that the contingent fee agreement contemplated the performance of substantial services to the petitioner by Colonel Westbrook and Mr. Pulvermann which were, in fact, rendered (F. 137).

2. *The Opinion Below.* In its opinion (Pet. App. 17–26), the Court of Claims ruled that the petitioner's agreement with Colonel Westbrook and Mr. Pulvermann did not violate the warranty against contingent fees in the contract. In the court's view, it was only by dint of the experience and qualifications of the

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securing contracts for various metals in the United States and Europe (F. 50(b)).

[3] With respect to some of the contacts on which this finding is presumably based, see Findings 19(b), 43, 44, 45, 56(c), 61, 87(a), 88(a).

two men and their perseverance in pressing the petitioner's offer that the contract with the United States was finally consummated. The court also pointed to the industrial consulting work done on the petitioner's behalf by Colonel Westbrook and Mr. Pulvermann. It concluded that Companhia Atlantica had not committed a breach of the warranty against contingent fees in that Colonel Westbrook and Mr. Pulvermann fell within the exception (see *supra*, p. 2) covering "bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business".

REASONS FOR GRANTING THE WRIT

Had the Court of Claims not held that Colonel Westbrook and Mr. Pulvermann came within the exception in the warranty against contingent fees covering "bona fide employees or bona fide established commercial or selling agencies * * *," the United States would have had a complete defense to the petitioner's action below since, under the express terms of the warranty, it had the right to annul the contract without liability.

The warranty in Government contracts against contingent fee arrangements reflects a firmly rooted principle of public policy which condemns the tendency of such agreements toward improper solicitation of and pressure on public officers, even though in a particular case it may be impossible to establish that improper means were, in fact, contemplated or used. As this Court stated with regard to contingent fee contracts in *Tool Co.* v. *Norris*, 2 Wall. 45, 56:

> * * * it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

The same concept has been consistently applied by this Court on other occasions. *E.g., Muschany* v. *United States*, 324 U.S. 49, 64; *Hazelton* v. *Sheckells*, 202 U.S. 71, 78–79.

While the Court of Claims found that Colonel Westbrook had used his influence "to open doors" (F. 137(c)), it ruled that Colonel Westbrook and Mr. Pulvermann came within the express exception to the warranty. In our view, whether the opinion below is read as classifying these men as bona fide employees, or as constituting a bona fide established commercial or selling agency of Companhia Atlantica,[4] the Court of Claims erred. Under the very terms of the exception itself, the applicable case law and the General Services Administration regulations on the question of contingent fee contracts,[5] to be a bona fide employee of a contractor within the meaning of the ex-

[4] Each of the two categories is used by the Court of Claims at different points in its opinion.

[5] 44 C.F.R. § 150.1, *et seq.*

ception, one must be subject to the right of his employer to exercise supervision and control as to time, place, and manner of performance of work. It is clear from the record and the findings below that Companhia Atlantica possessed no such right nor exercised any control over the activities of either Colonel Westbrook or Mr. Pulvermann. On the other hand, the record and findings below are equally clear in demonstrating that these men were not a commercial or selling agency within the meaning of the exception since they were manifestly not an *established* agency maintained by the contractor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for a writ of certiorari in No. 209, this Term, then it should also grant this conditional cross-petition for a writ of certiorari.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
HERBERT E. MORRIS,
Attorneys.

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